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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1969.

No. [redacted] 197

ROBERT FOYE O'NEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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INDEX.

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and Federal rules involved	2
Statement of the case	3
Reasons for granting the writ	5
Conclusion	10
Appendix:	
A—Opinion of Court of Appeals for the Fifth Circuit	A-1
B—Judgment of Court of Appeals for the Fifth Circuit	A-15
C—Order denying petition for rehearing	A-17
D—Constitutional provisions, rules and statutes involved	A-18
E—Brief of Appellant in the Fifth Circuit	A-20

Cases Cited.

Girgento v. United States, 81 Fed. 2d 741, 742	8
Mapp v. Ohio, 367 U. S. 643	6
Norrell v. State, 116 Ga. App. 479, 157 S. E. 2d 784 (1967)	9
Silverthorne Lumber Company v. United States, 251 U. S. 385	6

United States v. Romano, et al., 330 Fed. 2d 566 (1964) 8

Vick v. United States, 216 Fed. 2d 228 8

Weeks v. United States, 232 U. S. 383 6

Wong Sun v. United States, 371 U. S. 471 6

Constitution, Statutes and Rules Cited.

Fourth, Fifth and Sixth Amendments to the Constitution of the United States 2, 6, 7

Rules 5 (a) and 41 (e), Federal Rules of Criminal Procedure 2, 6

28 U. S. C. 1254 (1) 2

26 U. S. C. A., Sections 5173, 5179 (a), 5180, 5601 (a), 5602 and 5681 (c) 2, 3

Text Cited.

Mercer Law Review, Vol. 20, pp. 81-82 9

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner, Robert Foye O'Neal, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 19th of March, 1969.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition (Appendix A).

JURISDICTION.

The Judgment of the Court of Appeals for the Fifth Circuit was entered on the 19th of March, 1969 (Appendix B). Petitioner filed a Motion for Rehearing on the 29th of March, 1969. Said Motion was denied 6th of May, 1969 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Did the Court err in failing to sustain Petitioner's Motion to Suppress, Specification of Error 1?

(2) Did the Court err in failing to sustain Petitioner's Motion for Disclosure, Specification of Error 2?

(3) Did the Court err in failing to grant and sustain Petitioner's Motion for Directed Verdict of Acquittal, Specification of Error 3?

(4) Did the Court err in failing to charge the jury as requested by Petitioner's counsel, to-wit:

(a) with regard to the law of impeachment;

(b) circumstantial evidence;

(c) presence at a still;

(d) the laws of Admissions, Confession and Incriminating Statements, Specification of Error 4?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED.

The Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America; Rules 5 (a) and 41 (e), Federal Rules of Criminal Procedure; and 26 U. S. C. A., Sections 5173, 5179 (a), 5180, 5601 (a), 5602 and 5681 (c) (Appendix D).

STATEMENT OF THE CASE.

April 1, 1968, Petitioner was convicted in the United States District Court, Middle District of Georgia, for violating the Internal Revenue Code, on a four-count Indictment, it being charged he violated 26 U. S. C. A., Sections 5179 (a), 5601 (a), Count One; 26 U. S. C. A., Sections 5173, 5601 (a), Count Two; 26 U. S. C. A., Section 5602, Count Three; and 26 U. S. C. A., Sections 5180, 5681 (c), Count Four.

The evidence showed that State Revenue Agents Hendley and Bailey, while routinely investigating purported illegal liquor operations not associated with Petitioner, came upon an unoccupied automobile located approximately 50-75 yards from an abandoned house. When inspecting the house, outside they saw a man approaching. Upon commanding him to stop, the unidentified man, later identified as Duncan Padgett, Jr., fled toward the adjacent woods, shouting "Revenue Officer", time, 10:00 A. M. Hendley saw no one at the still. Bailey swore he saw three unidentified men running from the still site; having sworn three months earlier, in a previous trial, he had seen but two men fleeing the site. Prison trustees with dogs were called to track the men fleeing the still operation. They arrived 30-45 minutes later, and began tracking the men. Petitioner was not identified as the man approaching the abandoned house; nor was he identified and seen at the still site. Agent Barrett, Special Investigator for the U. S. Treasury Department, arrived at approximately 1:00 P. M.

2-7 miles from the still, the prison trusties came upon three men. They were standing next to a paved public road. After shouting at them, shots were immediately fired. The men broke and ran, but were later apprehended

a short distance therefrom. The men arrested were Duncan Padgett, Jr., Eddie Cooper, Jr., and Petitioner. At the time, the trustees had no warrant and had seen no one commit a crime. A short time later they were placed under the detention and supervision of the State and Federal agents, having been returned to the still site; time, 1:30 P. M.

The agents informed Petitioner of his Miranda rights, and later interrogated him. As a result of the interrogation, and Petitioner's purported comments at the site, Petitioner's ownership of the unoccupied automobile was determined, and testimony given that Petitioner claimed a field jacket found at the still. Evidence taken from the car was also introduced.

Petitioner was held at the scene until approximately 4:30-6:45 P. M., and then taken to Americus, Georgia, via Fitzgerald, Georgia, finally being placed in jail at 10:00 P. M. During the course of his detention, agents left the site for various reasons, including Agent Barrett. He left for Fitzgerald, Georgia, and remained away approximately 45 minutes—three hours. Petitioner was not taken before a committing Magistrate or U. S. Commissioner until the next day.

Petitioner was never identified as being one of the men, or a man, at the still site.

At no time did anyone have a warrant for Petitioner's arrest.

Petitioner's Motions to Suppress and Disclose were heard and denied March 27, 1968. They were renewed, insisted upon and overruled at the time of the trial. As alleged, Petitioner was convicted, and appealed. The factual statements made are taken from the Record, as identified in Petitioner's Brief and Motion for Rehearing.

REASON FOR GRANTING THE WRIT.

Question One. The Exclusionary Rule and/or Derivative Evidence Rule prohibits the introduction of any evidence discovered and obtained following an initial illegal arrest, detention, search or seizure. The subsequent discovery of incriminating evidence influences and plays no part in determining whether or not it is admissible. In all of the cases cited in Petitioner's Brief and Motion for Rehearing, previously filed, incriminating evidence was discovered, and its introduction improperly allowed. Reversals were later declared. Likewise, here, incriminating evidence was improperly offered and allowed. Respondent contends the evidence was properly allowed and the rule avoided and subverted, because Petitioner was informed of his Miranda rights. Nothing could be more fallacious! The evidence came by exploitation; it was the product of an illegal arrest, detention, search and seizure. It was obtained while Petitioner was illegally detained. At the time the prison trusties made the arrest, Petitioner had violated no law in their presence; had not been identified as one at the still, or seen at the still; the number of men fleeing the still was not known; he had not committed any act or acts giving rise to "suspicion and/or probable cause"; no one had a warrant; the arrest was made 2-7 miles from the still and approximately three hours after the men had fled; and the trusties had no authority to make an arrest.

As previously asserted, Respondent contends its discovery and use of incriminating evidence associating Petitioner with the illegal operation, was admissible and/or removed from the Exclusionary Rule by virtue of the Agent's citing **Miranda**. At the time this case was argued by counsel in New Orleans, the Court seemed to excuse the absence of a legal arrest, stating, "What you

are trying to say is you do not feel the incriminating evidence should be introduced for it convicted your client". This "observation" is in direct conflict with **Weeks v. United States, 232 U. S. 383; Mapp v. Ohio, 367 U. S. 643; Silverthorne Lumber Company v. United States, 251 U. S. 385; Wong Sun v. United States, 371 U. S. 471;** and other citations in Petitioner's Brief. Quoting **Miranda** did not rectify the situation, legalize the arrest or remove the bar of inadmissibility. Petitioner's illegal arrest resulted in his detention. His detention afforded the agents an opportunity for observation, detection and interrogation. Had not Petitioner been illegally arrested and detained, Respondent would not be the beneficiary of the purported statements and evidence later made and discovered. Without one, there would not have been the other. **Wong Sun v. United States,** *supra.* Nothing connected Petitioner to the car and jacket but his remarks made after the illegal arrest. Without this evidence, Petitioner's acquittal was demanded.

In keeping with **Professor Dession's** treatise on the Federal Rules, and **Mallory,** Petitioner's detention at the scene, and the failure of the Respondent to immediately bring him before a Magistrate or Commissioner, demands the avoidance of any information and/or evidence subsequently obtained. In addition to the support given by Rule 5 (a) to Petitioner's Motion to Suppress, the Sixth Amendment to the Constitution of the United States supports the authority and premise upon which the Rule is founded, stating Petitioner's right to be informed of the nature and cause of the accusation before and by a Commissioner or Magistrate.

Subsequent adherence to the law does not correct or purify initial wrongdoings and/or an initial illegal arrest. The "original sin" of evidence was not cured simply because the agent quoted **Miranda.**

We say the Fifth Circuit has decided this case adversely to the applicable citations of authority set forth in Petitioner's Brief and Motion for Rehearing, and failed to properly apply same. The effect of its decision under the evidence is an unwarranted extension of the rule permitting arrests without a warrant, and detention for unreasonable periods.

Question Two. Current legal thought, as is in part evidenced by the proposed new Georgia Criminal Procedure Act, Section 27-1407 (d), recognizes the value and necessity of a rule affording Defendants' rights of discovery, enabling them to make an informed-intelligent defense. Discovery of the truth being the object of all legal investigations, and trials, what acceptable reason can the Respondent give for objecting to the naming of the witnesses it intended to call. National security was not at stake! The only witness used in Petitioner's trial who was not called in the previous trial of Messrs. Padgett and Cooper, was Charles Mitchell Hoffman (R. pp. 90-99). His testimony was complex and technical. Neither Petitioner nor his counsel was able to intelligently comprehend, refute or question the information given. As the testimony was the most important given by a government witness, can it be denied Petitioner was harmed and prejudiced by the failure of the Court to direct Respondent to divulge the witness's identity? No! The Due Process Clause of the Fifth Amendment is meaningless and redundant if Respondent's denial is upheld. The rights afforded by the **Sixth Amendment, Constitution of the United States**, support Petitioner's Motion for Disclosure.

Question Three. Petitioner's arguments made in support of Question One, Specification of Error 1, are also applicable here; however, his Motion for a Directed Verdict of Acquittal will be strengthened if the Court favor-

ably rules thereon. If the evidence sought to be excluded by Petitioner's Motion to Suppress is not allowed, there is absolutely no evidence upon which to base a conviction. Succinctly, can it be denied that a manifest miscarriage of justice resulted? No! As pointed out in Petitioner's Motion for Rehearing, if a Defendant cannot be convicted because of his mere presence at a still, how can he be convicted because his jacket was found at a still, or his car was found seventy-five plus yards from a still? There is absolutely no evidence in the Record connecting Petitioner with the illegal operation. He was never placed, seen or identified at the still, until his return after the trustees' illegal arrest some two miles plus distant.

Petitioner's motion simply states his conviction was unwarranted on general grounds. The Fifth Circuit's decision affirming Petitioner's conviction is adverse to the holdings in **United States v. Romano, et al., 330 Fed. 2d 566 (1964); Vick v. United States, 216 Fed. 2d 228;** and **Girgento v. United States, 81 Fed. 2d 741, 742.**

Question Four.

(a) Impeachment—David E. Bailey's testimony (R. pp. 71-76), coupled with Petitioner's request that the Court charge the law of impeachment, clarifying for the jury the effect, significance and meaning of his contradicting sworn statements, and instructions on how they may and/or should be considered and applied, demanded the Charge, as requested. The Charge given was incomplete, and did not adequately and sufficiently state the law of impeachment, denying Petitioner a valuable right of trial practice and procedure. Petitioner's arguments heretofore given in his Brief and Motion for Rehearing state the case.

(b) Circumstantial Evidence—During the course of the trial (R. p. 122), Respondent's counsel objected to Peti-

tioner's counsel's statement of the law of Circumstantial Evidence. The objection highlighted the significance and application of the Rule, and made it even more important and mandatory that a complete and clear definition of the same be given by the Court, as requested. Petitioner's Brief and Motion for Rehearing argue the validity of the Request to Charge.

(c) Presence at a Still—The decisions heretofore cited under Question Three, Specification of Error 3, are applicable.

(d) Admissions, Confessions and Incriminating Statements—The assertion of error (omission) states a basic and prejudicial error, entitling it to consideration. For the purpose of this appeal, it "excuses" counsel's failure to assert error at the time of trial.

The arguments set forth in Petitioner's Brief and Motion for Rehearing were further elaborated upon by a Letter Brief dated April 3, 1969, addressed to the Honorable Edward W. Wadsworth, Clerk, Fifth Circuit, citing **Mercer Law Review, Vol. 20, pp. 81-82.** The article cites **Norrell v. State, 116 Ga. App. 479, 157 S. E. 2d 784 (1967).** The Court's charge on confessions was held to be error for the reason that the statement was not a confession but, at most, an admission. The terms "confession" and "admission" are defined. We again ask the Court's review of the citation.

Petitioner attaches hereto as Appendix E, his Brief, Brief of Appellant, filed in the Fifth Circuit, Case Number 26,081, making it a part and parcel of his argument in support of the Petition for Certiorari.

CONCLUSION.

For the foregoing reasons, Petitioner asks that his Petition for Certiorari be granted in order that the Questions may be determined.

Respectfully submitted,

.....

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I hereby certify that I have this date served opposing counsel, Mr. Walker Johnson, Assistant U. S. Attorney, U. S. Post Office Building, Macon, Georgia, with a true and correct copy of the above and foregoing Petition for a Writ of Certiorari by placing the same in a properly addressed envelope, with the correct amount of postage affixed thereto, in the U. S. Mail.

This ..... day of May, 1969.

.....

T. Malone Sharpe.

APPENDIX A.

OPINION.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 26,081.

Robert F. O'Neal,
Appellant,
versus
United States of America,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(March 19, 1969)

Before Brown, Chief Judge, Ainsworth, Circuit Judge, and Fulton, District Judge.

Fulton, District Judge: Appellant stands convicted upon each count of a four-count indictment which charged him with violation of Internal Revenue laws relating to non-tax paid distilled spirits. We affirm the conviction on each count.

In Count 1 appellant was charged with possession and custody of and control over an unregistered moonshine still, in violation of 26 U. S. C., §§ 5179 (a) and 5601 (a);

in Count 2 with carrying on the business of a distiller without having given bond, in violation of 26 U. S. C., §§ 5173 and 5601 (a); in Count 3 with engaging in and carrying on the business of a distiller with intent to defraud the United States of the tax on spirits distilled by him, in violation of 26 U. S. C., § 5602; in Count 4 with working in a distillery for the production of spirits upon which no sign was placed and kept, in violation of 26 U. S. C., §§ 5180 and 5601 (a).

Jointly indicted with appellant were two others, Padgett and Cooper. However, they were tried and convicted upon the same offenses several months before the trial and conviction of appellant. Neither of them testified in the trial of appellant.

Appellant claims multiple errors as grounds for reversal, among which he specifically challenges:

1. The validity of his arrest and the seizure and search of his automobile.

2. The failure of the arresting officers to more promptly take him before a United States Commissioner.

3. Portions of the jury charge as given and the failure of the Court to charge on other matters.

4. The denial of appellant's pretrial motion seeking the Government's witness list and the denial of his motion for judgment of acquittal.

5. The denial of appellant's motion to appeal in forma pauperis.

The Sequence of Events.

There is ample evidence in this record whereby the jury could have found the following facts. A mere in-

spection of this evidence does much to resolve the issues upon this appeal.

By pre-arrangement, two state revenue officers were to meet a federal revenue agent in a sparsely populated and heavily wooded area of Wilcox County, Georgia, where they proposed to discuss and investigate illicit liquor operations in that area. Apparently, this investigation did not have as its target any particular still or person.

The state officers arrived in the area about ten o'clock on the morning in question, slightly ahead of the federal agent. Their attention was drawn to a suspicious path which led into the woods, which they followed until they came upon a house and some barns, all abandoned. An unattended 1960 Chevrolet automobile, bearing a license plate of an adjacent county, was partially secreted in a plum tree thicket within 75 yards of the house. As the state officers investigated the premises, a man was seen near the house. He was ordered to halt but fled into the woods yelling "revenue officers". While in hot pursuit, and at a location near the house and automobile, the state officers came upon four 1500-gallon moonshine stills, one of which was then in operation. As one of the state officers approached the stills, two or three men were seen fleeing the scene.

The officers immediately radioed a nearby prison for help. Within a few minutes a deputy warden and some prison trusties, armed with pistols and accompanied by bloodhounds, arrived at the stills and began to track the men who had fled into the woods. Soon thereafter the federal agent arrived and was briefed by the state officers, after which he left the site of the stills in his automobile to patrol the dirt roads in the vicinity. About noon or shortly thereafter, at a distance of a mile or two from the stills, the prison personnel came upon Padgett, Cooper and the appellant, all of whom refused to surrender when

ordered to do so. They were chased and finally apprehended, after several warning shots had been fired. Within a few minutes after their capture, the three men were delivered by the prison personnel to the federal agent who was waiting in his automobile on a road nearby. During the pursuit there was radio communication between the state officers who remained in the vicinity of the stills, the prison personnel who were in pursuit and the federal agent who was patrolling in his automobile.

Immediately upon taking the three men into custody, the federal agent returned them to the stills. Before any of the three men made any statement, they were twice fully advised of their constitutional rights, as delineated by Miranda, once by a state officer and once by the federal agent. The prisoners indicated that they understood what was then said to them in that regard. Thereupon, their handcuffs were removed and they were permitted freedom to move around in a limited area. Soon thereafter, Padgett, who was wearing only a skivvy shirt, asked one of the officers, "Can I go get my shirt?" When the officer asked for the location of the shirt, Padgett pointed to a shirt hanging in a tree, some thirty feet from one of the stills. With the permission of the officers, Padgett walked to the tree, secured his shirt and put it on. Nearby, laying upon gas cylinders which were used in the operation of the stills, were a sports coat and an Army field jacket. After putting on his shirt, Padgett asked Cooper, "Do you want me to bring your coat back with me?" Cooper's reply was, "No, leave it laying there." Padgett then turned to appellant and inquired, "Do you want me to bring your jacket?" Appellant replied, "Yes, bring it." As Padgett was taking the jacket to appellant, the latter said, "Look in my pocket and get my cigarettes out of it." Padgett inspected the pockets and found no cigarettes and so advised appellant, where-

upon appellant said, "Okay, just throw it down." Padgett was identified as the man who was observed by a state officer that morning near the house. Neither appellant nor Cooper were identified as having been seen at the still site by any of the officers.

Soon after the jacket incident, the federal agent inquired of the three men about ownership of the Chevrolet. No one answered. The federal officer testified that he then seized and searched the automobile; and that the search produced two pipe fittings, a pair of pliers and some grain sweepings, all of which were shown to be connected with the still operations. In response to a further question from the federal agent as to the ownership of the Chevrolet, appellant finally stated that it belonged to him and that he had owned it for about a year.

In the early afternoon, the federal agent and one of the state officers traveled to the town of Fitzgerald, about ten miles from the site of the stills. This trip took about 45 minutes. From the time of their return to the stills until after six o'clock that evening the federal agent and the state officers were engaged in their investigation, which included making an inventory of all articles, lifting fingerprints, checking all trails running to and from the area, and finally destroying the entire distillery. The federal agent and the prisoners then left the site of the stills and proceeded to a drive-in restaurant in Fitzgerald, where they ate. Afterwards they drove to Americus, which is about 70 miles from the site of the stills, perhaps 80 miles by way of Fitzgerald. Upon arriving at Americus, the three prisoners were photographed, fingerprinted and otherwise "booked in", after which they were placed in the jail, about ten o'clock at night.

The United States Commissioner who was nearest to the distillery was the Commissioner at Americus. At ten o'clock the next morning, the appellant and other prison-

ers were taken before that Commissioner. During appellant's trial, when defense counsel complained about the delay in taking appellant before the Commissioner, the District Judge judicially noted that at the time of appellant's incarceration at Americus the United States Commissioner there had recently undergone surgery and was in frail health.

Although appellant told the officers at the still site that he had owned the Chevrolet for about a year, when he took the witness stand at his trial he testified that he bought the Chevrolet the day before his arrest in the nearby town of Soperton from a Mr. Whittaker, who did not testify. Appellant testified that Cooper went with him to Soperton to take delivery of the Chevrolet; that on the morning after he purchased the Chevrolet, he lent it to Cooper and Padgett so that they could use it for a trip to Abbeville, but upon the condition that they would drop him off at a pond so that he could fish while they were in Abbeville; that within several hours after he was left at the pond, Padgett and Cooper emerged on foot from the nearby woods, wet and muddy; and that one of them said to him, "We went to a whiskey still and revenues (sic) have run us off and your car is still over there in the woods"; that as they stood there talking the dogs and trusties came out of the woods toward the pond, with the trusties discharging their firearms; that through fright he joined Padgett and Cooper in their flight from their pursuers; that after a chase and the firing of further shots Padgett, Cooper and appellant surrendered. Appellant did not disclose his alibi to his captors, nor to any of the officers. In fact there is no record of his having claimed the alibi until he did so on the witness stand.

1. Validity of Arrest, Search and Seizure.

Appellant contends that he was unlawfully arrested by the prison trusties. The record shows that the appellant

and others were detained by the trusties only a few minutes, until the deputy warden in charge of the trusties arrived and transported them to a nearby road where federal agent Barrett was waiting, and by whom they were immediately arrested.

If it is considered that Appellant was arrested by the prison trusties, the validity of the arrest depends on the law of citizens' arrest. In the absence of specific federal statutory authority, the validity of an arrest made by a private citizen depends on the applicable state law. *United States v. Di Ri,* 1948, 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210; *Alexander v. United States,* 5 Cir., 1968, ... F. 2d ... (No. 24695, Feb. 20, 1968). The following Georgia statute is applicable:

> A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge; and if the offense is a felony, and the offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion. Ga. Code Ann., Title 27, § 27-211 (1953).

A still was being operated within the immediate knowledge of these trusties. The manner of its operation constituted several offenses of felony degree. The trusties knew that the offenders had fled the stills and were attempting to escape. Having been led to them through the woods by bloodhounds, the trusties certainly had reasonable and probable grounds to believe that they were guilty of felony offenses.

Even if the initial arrest by prison trusties was defective, which we find it was not, within a few minutes thereafter appellant was validly arrested by federal agent Barrett, a Special Investigator, United States Treasury Department, Alcohol and Tobacco Tax Division. Agent

Barrett and the state officers discovered this moonshine operation quite unexpectedly. They had no warrant, but such an occurrence is provided for by statutory authority for an Internal Revenue Agent to:

> (3) . . . make arrests, without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony. 26 U. S. C., §7608 (a) (3).

Agent Barrett certainly had reasonable grounds to believe that appellant had committed a felony against the United States. He had observed one of the stills in operation. Stated differently, a crime was actually believed committed in the presence of the officers. Two or three men had been seen running from the stills, and the trusties had been led by bloodhounds to three men, including the appellant, at a place in the woods a mile or two distant from the stills. The three of them fled when they were approached by the trusties and were apprehended only after warning shots were fired. There can be no question about the validity of this arrest by Agent Barrett.

Appellant argues that the District Judge should have suppressed certain evidence which was found in his automobile, including the sweepings of wheat bran and wheat starch, pipe fittings and pliers. All of these items were shown by the evidence to be connected with the operation of the stills. It is elementary law that a reasonable search may be made in connection with a valid arrest. Permissive seizure of items during a search is no longer limited to fruits and instrumentalities of a crime, but extends to all articles of evidential value which the officers have probable cause to believe will aid in the apprehension or conviction of the individual whose criminal

behavior justified the search. *Warden v. Hayden,* 1967, 387 U. S. 294. Before appellant acknowledged ownership of the automobile, he was twice advised of his constitutional rights. Under the facts and circumstances of this case, it would have been totally unreasonable not to search appellant's automobile.

2. The Delay in Presenting Appellant Before a Committing Magistrate and His Extrajudicial Admissions.

Appellant argues that he was detained too long before being taken before a committing magistrate. He claims that he would not have made the incriminating statements if he had been promptly taken before such an officer, as required by Fed. R. Crim. P. 5 (a). Thus, he contends that his statements were inadmissible under *Mallory v. United States,* 1957, 354 U. S. 449, 77 S. Ct. 1356, and its antecedent, *McNabb v. United States,* 1943, 319 U. S. 784, 63 S. Ct. 608. In *Mallory,* a suspect of limited intelligence was arrested about two o'clock in the afternoon and detained under intensive questioning by police until he confessed six hours later. He was then further interrogated until he dictated a confession shortly after midnight. He was not taken before a United States Commissioner until the following morning. The confession was held inadmissible as having been elicited while the defendant was being held in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure.

Appellant was arrested about noon and was not taken before the United States Commissioner until the next morning. However, he was arrested in an isolated area, some seventy miles from the nearest Commissioner. The arresting officers were charged with the duty of investigating the area, inventorying the equipment, and destroying the distillery. Title 26, U. S. C., §§ 5615 (1), 5681 (c). These acts must be done immediately. If the officers leave and return later, evidence may be removed or destroyed

in their absence. These activities require care and expertise, and consume considerable time, especially in a mammoth moonshine operation such as the one involved in this case. By the time the investigation and destruction of the still were completed and the suspects transported eighty miles, fed and "booked", it was ten o'clock at night. They were taken before the Commissioner the next morning. The District Judge judicially noticed that the United States Commissioner had recently undergone serious surgery on two occasions, and that his poor health probably entered into the decision of the agents to postpone the hearing until morning.

There was no intentional delay in taking appellant before a magistrate. In contrast to the *Mallory* situation, appellant was not subjected to intensive and exhausting interrogation with a view toward making him refute an earlier denial of guilt. Instead, his admission of ownership of the jacket came in response to an inquiry from Padgett and was not elicited in any way by the officers. His later admission of ownership of the automobile was shortly after his arrest, and after his constitutional rights had twice been fully stated. *Mallory* was decided before *Miranda v. Arizona,* 1966, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. *Mallory* was intended to insure that a suspect not be held for long hours of interrogation during which he had only his own personal stamina with which to resist an overbearing police barrage, and that if he were so intimidated the evidence thus gleaned could not be used at trial. With *Miranda,* however, came the decree that all persons taken into custody must be immediately warned of certain constitutional rights. Appellant was given these warnings. He knew he was entitled to counsel and that he need not speak to the officers at all. Knowing this, he chose to speak. How, then, can *Mallory* aid him? His detention before seeing the Commissioner, though delayed, caused him no harm.

3. **Jury Instructions.**

Counsel for appellant made no oral or written request for any specific jury charge until after the Court had charged the jury and asked counsel to state their objections. At that juncture, counsel for appellant orally requested additional instructions, including a charge "on the law of impeachment" and a charge that "in order to convict a defendant on circumstantial evidence, every hypothesis save that of the guilt of the accused must be removed from the evidence."

As a basis for the request for a charge on the law of impeachment, counsel pointed out that during the trial of Padgett and Cooper one of the state officers testified that when he came upon the stills he saw two men fleeing therefrom; but that during the trial of appellant, two months later, the same officer testified that he saw three men fleeing the scene. An inspection of the jury charge which the able trial judge gave reveals that the jury was properly and extensively charged upon its role in judging witness credibility. Moreover, the record shows that upon cross-examination of the officer in question, he acknowledged that there was this discrepancy in his testimony. The jury was fully aware that the veracity of this officer had been drawn in question and that his credibility was for them to decide which they did.

In support of his request for an additional charge on the subject of circumstantial evidence, the appellant relies heavily upon *Vick v. United States*, 5 Cir. 1954, 216 F. 2d 228. This reliance is misplaced. *Vick* does not teach that in a circumstantial evidence case it is proper for the trial judge to charge the jury that the Government's evidence must be such as to exclude every reasonable hypothesis other than that of guilt. In this context, *Vick* merely states the standard by which a trial judge considers a motion for judgment of acquittal and the

standard by which an appellate court reviews the denial of such motion.

> In circumstantial evidence cases, this Court has said repeatedly that to sustain conviction the inferences reasonably to be drawn from the evidence must not only be consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence (citations omitted). In such cases the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude. *Vick v. United States, supra,* at pg. 232.

Since *Vick,* this same rule has been clearly stated and applied by Judge Hutchinson in *Culbreath and Busby v. United States,* 5 Cir. 1960, 278 F. 2d 220, and by Judge Goldberg in *Sykes v. United States,* 5 Cir. 1967, 373 F. 2d 607, cert. den. ... U. S. ..., 87 S. Ct. 1172. In the case before us, the trial judge properly charged the jury that the Government had the burden of proving the guilt of the defendant beyond a reasonable doubt. The words "reasonable doubt" were clearly and accurately explained. With respect to appellant's alibi that he was not a moonshiner but a fisherman, the able trial judge instructed the jurors that if there was a reasonable doubt as to whether defendant was present at the time and place of the alleged offenses, they should resolve such doubt in favor of the defendant and acquit him. In a circumstantial evidence case, such as this, where the jury has been properly instructed on the standard of reasonable doubt, as was done here, an additional charge that the evidence must exclude every reasonable hypothesis other than that of guilt is confusing and incorrect.

Holland v. United States, 1954, 348 U. S. 932, 75 S. Ct. 127.

In addition to the foregoing, appellant requested the trial judge to charge that the jury verdict must be unanimous and that "mere presence at a still creates no presumption of guilt or innocence." The first of these requests has been abandoned on appeal and the other does not merit any discussion.

Finally, appellant contends that the portion of the charge which discussed his extra-judicial admissions of ownership of the jacket and the automobile was so inappropriate and incomplete as to constitute plain error; and that this Court should reverse even though this alleged error was not saved for our consideration by a specific exception at the trial. An inspection of that portion of the charge discloses that it fully and fairly stated the law on extra-judicial admissions. We find nothing in this or any other regard to warrant application of the plain error rule. *Brown v. United States,* 5 Cir. 1967, 375 F. 2d 769.

4. Pretrial Witness List and Motion for Judgment of Acquittal.

Appellant moved for pretrial disclosure of all Government witnesses to be called at trial. The denial of this motion was properly within the discretion of the District Judge, and we find no abuse of that discretion. *Downing v. United States,* 5 Cir. 1965, 348 F. 2d 594.

Upon denial of his motion for judgment of acquittal, appellant proceeded to present evidence in his defense, and concluded the case without renewing the motion. He thus abandoned the motion, making its denial inappropriate for review. *Wilkins v. United States,* 5 Cir. 1967, 376 F. 2d 552; *Clark v. United States,* 5 Cir. 1960, 285 F. 2d 85, *cert. denied* 368 U. S. 820, 82 S. Ct. 38, 7 L. Ed. 26. The evidence of appellant's guilt is such that it obviously does not warrant a finding that the conviction was a

manifest miscarriage of justice. *Meeks v. United States*, 5 Cir. 1958, 259 F. 2d 328.

5. **Motion to Appeal in Forma Pauperis.**

Appellant filed with the District Court a motion to appeal in forma pauperis, which was supported by his affidavit. No response was filed by the Government, and no hearing was had upon the petition, which was summarily denied. Apparently, retained counsel has borne the cost of this appeal under an agreement whereby appellant will reimburse counsel if and when he can.

In the absence of any findings by the District Judge indicating a factual basis for the exercise of his discretion under Title 28, U. S. C., § 1915, we are unable to adequately consider this point on appeal. Appellant's uncontroverted affidavit made out a prima facie case of indigency under the statute. It cannot be said that this appeal is frivolous. We, therefore, remand this case solely for a determination whether appellant's counsel should be reimbursed for the costs of this appeal, as provided by law. *Adkins v. E. I. DuPont de Nemours & Co., Inc.*, 1948, 335 U. S. 331, 69 S. Ct. 85, 93 L. Ed. 43; *Kitchens v. D. H. Alderman*, 5 Cir. 1967, 376 F. 2d 263.

The judgment is in all respects affirmed, except that upon remand the District Judge shall determine whether the appeal should be permitted in forma pauperis for reimbursement of appellant's costs.

APPENDIX B.

JUDGMENT.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1968.

No. 26,081.

D. C. Docket No. Criminal 1588.

Robert F. O'Neal,
Appellant,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before Brown, Chief Judge, Ainsworth, Circuit Judge, and Fulton, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in all respects, except that upon remand the District Judge shall determine whether the appeal should be permitted in forma pauperis for reimbursement of appellant's costs.

March 19, 1969

Issued as Mandate:

APPENDIX C.

ORDER.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 26,081.

Robert F. O'Neal,
Appellant,
versus
United States of America,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

On Petition for Rehearing and Petition For Rehearing En Banc.

(May 6, 1969)

Before Brown, Chief Judge, Ainsworth, Circuit Judge, and Fulton, District Judge.

Per Curiam: The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is

Denied.

APPENDIX D.

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED.

Fourth Amendment, Constitution of the United States, provides in pertinent part:

> "The right of the people to be secure in their persons, . . ., papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Rule 5 (a), Federal Rules of Criminal Procedure, provides in pertinent part:

> "(a) Appearance Before the Commissioner . . . any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought

before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 41 (e), Federal Rules of Criminal Procedure, provides in pertinent part:

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. . . . the motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, . . ."

Section 27-1407 (d), Motion for Discovery and Inspection, Proposed Georgia Code of Criminal Procedure.

"(d) Upon written motion of defendant made at least five days prior to trial, or at such reasonable later time as the court may permit, the court shall order the State to furnish the defendant with a list of all witnesses expected to be called to testify against him on the trial of the case."

APPENDIX E.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

No. 26,081.

ROBERT FOYE O'NEAL,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia, Americus Division.

BRIEF OF APPELLANT.

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TABLE OF CONTENTS.

	Page
Statement of the case	1
Statement of evidence	3
Questions presented and specifications of error	9
Argument and citation of authorities	10
Conclusion	27

Cases Cited.

Alberty v. United States, 162 U. S. 449, 510	21
Anderson v. United States, 318 U. S. 350, 355	13
Cuthbert v. United States, 278 F. 2d 220	19, 23
Downing v. United States, 348 F. 2d 594 (1965)	16-17
Fowler v. United States, 234 F. 2d 697	19
Girgento v. United States, 81 F. 2d 741, 742	21
Mallory v. United States, 354 U. S. 449 (1957)	15
Mapp v. Ohio, 367 U. S. 643 (1961)	11
McFarlan v. United States, 273 F. 2d 417	19
McNabb v. United States, 318 U. S. 332	12, 15, 17
Moore v. United States, 271 F. 2d 564	19
Sabbath v. United States, No. 898, October Term, 1967, decided June 3, 1968, U. S. Supreme Court, 36 LW 4502	19
Silverthorne Lumber Company v. United States, 251 U. S. 385 (1920)	11
Sykes v. United States, 373 F. 2d 607, 609	19, 23
United States v. Freeman, 286 F. 2d 292	19
United States v. Romano, et al., 330 F. 2d 566 (1964)	18, 25

Vick v. United States, 216 F. 2d 228 ..... 19, 21, 23, 25
Weeks v. United States, 232 U. S. 383 (1941) 11
Wong Sun v. United States, 371 U. S. 471 (1963) .. 11, 14

Statutes Cited.

Constitution of the United States:
Fourth amendment 15
Fifth amendment 15
26 U. S. C. A., Section 5173 2
26 U. S. C. A., Section 5179 (a) 1
26 U. S. C. A., Section 5180 2
26 U. S. C. A., Section 5601 (a) 1, 2
26 U. S. C. A., Section 5602 2
26 U. S. C. A., Section 5681 (c) 2

Rules Cited.

Federal Rules of Criminal Procedure:
Rule 5 (a) 8, 11, 12, 15, 16
Rule 41 (e) 11

Textbooks Cited.

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McCormick on Evidence, 1964, Chapter 5, Sections 33, 34 et seq. 23

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 26,081.

ROBERT FOYE O'NEAL,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia, Americus Division.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Appellant was indicted and the Indictment filed July 25, 1967, charging violations of the Internal Revenue Code on March 14, 1967, as follows:

Count One—Did possess, have custody of and control an unregistered still in violation of 26 U. S. C. A., Sections 5179 (a), 5601 (a).

Count Two—Carrying on the business of a distiller without having given bond, in violation of 26 U. S. C. A., Sections 5173, 5601 (a).

Count Three—Defrauding the United States of taxes, in violation of 26 U. S. C. A., Section 5602.

Count Four—Absence and failure to display a proper sign at the distillery, in violation of 26 U. S. C. A., Sections 5180, 5681 (c).

Following said Indictment, Arraignment was waived and Appellant entered his Plea of "Not guilty", March 25, 1968 (R. p. 3). By agreement of Appellant's counsel, and the United States Attorney, Appellant was tried in Albany, Georgia, Albany Division, United States District Court, Middle District of Georgia, April 1, 1968. At the conclusion of the Appellee's presentation of its evidence, and after it had closed the Prosecution's case, Appellant moved for a Directed Verdict of Acquittal (R. pp. 101-105). Said Motion was denied. Following the Court's Charge, Appellant excepted and objected to certain parts thereof. Said exceptions and objections were overruled; exception again noted (R. pp. 144-146). A Verdict of "Guilty" was returned against the Appellant on all counts, Counts One-Four (R. p. 4), same date. Subsequently, Appellant was sentenced April 4, 1968 (R. p. 150). A Judgment and Commitment (R. pp. 152-154) was signed by the Honorable J. Robert Elliott, Judge, United States District Court. Appellant filed a Notice of Appeal April 15, 1968 (R. pp. 158-159), followed by a Motion for Appeal Under Pauper's Affidavit (R. pp. 160-162) filed April 26, 1968, denied same date (R. p. 162). Due to the press of professional duties, and the absence of a Transcript, Appellant's counsel filed a Motion for Extension of Time for the Filing and Docketing of the Appeal May 3, 1968; Order approving, filed same date (R. pp. 163-165).

Prior to the trial of said case, Appellant filed a Motion to Suppress March 21, 1968 (R. pp. 4-9) and a Motion for Disclosure (R. pp. 9-11). Said Motions were heard and overruled March 27, 1968 (R. pp. 11-12). The same were renewed and insisted upon at the time of the trial, and again overruled (R. pp. 104-105). The Stipulations—Evidence upon which the same were based are found on pp. 15-19, Record. The only evidence and/or testimony offered was that of Donald Barrett, Special Investigator, U. S. Treasury Department, pp. 22-36; 48, Record.

STATEMENT OF EVIDENCE.

With the permission of the Court, we will identify the witnesses and comment on the testimony and evidence elicited which we feel is material to a proper understanding of the questions presented by this Appeal, as identified in the following section, to-wit:

HERMAN HENDLEY (R. pp. 58-71):

Hendley was a Georgia Revenue Officer. He testified a Chevrolet automobile was found approximately 50-75 yards from an old house. As they were investigating the car and house, he saw a man walking towards him some distance away. He hollered and asked him to stay where he was at, but the man ran back into the woods hollering "Revenue Officer". He then went in the direction of the man and found four stills, one of them in operation. He did not see anybody at the still. He radioed the Pulaski Prison Branch to send some dogs (R. p. 59). 30-45 minutes later, he met the dogs and carried them to the still. The dogs and "dog boys" (prison trustees) began tracking whoever left the stills. While at the site, he discovered a plaid shirt, army-type field jacket and sports coat. He testified the Defendant

was not the man he saw coming toward him and to whom he gave chase; the man he saw was later identified as Duncan Padgett, Jr. He did not see the Defendant until 12:30-12:45 P. M. the same day, at the time he was returned to the still site with Duncan Padgett, Jr., and Eddie Cooper, Jr. (R. pp. 60-61).

While at the still site, Padgett turned to the Defendant-Appellant and asked him if he wanted him to bring his jacket, the army-type jacket found earlier. O'Neal said, "yes, bring it." O'Neal asked Padgett, "Look in my pocket and get my cigarettes out of it." There being none, the jacket was laid down. The jacket was first seen laying up on top of a gas cylinder at the distillery (R. p. 66). The destruction of the stills was completed at approximately 4:30 P. M. (R. p. 67). Agent Barnett, Special Investigator, U. S. Treasury Department, arrived at the scene at approximately 11:30 A. M.; he got there about the same time the dogs did. Later he left and got "us" something to eat, leaving after 1:30 P. M. He again left with the Defendant, Padgett and Cooper between 5:00 and 5:30 P. M. At no time up until he left with the Defendants did he, or anyone, have a warrant for the arrest of the men (R. pp. 69-70).

DAVID E. BAILEY (R. pp. 71-76):

Bailey was a Georgia Revenue Agent. He accompanied Hendley to the scene, and was with him when Padgett was seen approaching the old house. He affirmed the discovery of a 1960 Chevrolet with a 142 tag, Treutlen County. When he ran to the still site, he saw three men running from the still yard (R. p. 72). This testimony conflicts with his previous testimony in January, 1968, three months prior to the trial in question, at which time he testified he saw but two men running from the still site (R. pp. 75-76). He was unable to identify any of the men

(R. p. 73). The first time he saw O'Neal was when the dog boys and Agent Barrett placed him under arrest, the arrest occurring approximately one-two miles distant from the still (R. p. 74). When the automobile was searched, there were found some fittings, POL fittings, used on gas cylinders, and a pair of pliers (R. p. 75).

DONALD A. BARRETT (R. pp. 77-88, 100, 106-107):

Barrett was a Special Investigator for the U. S. Treasury Department. He testified he arrived at the scene approximately 1:00 P. M. (R. p. 77). Approximately two miles from the site, he arrested the Defendant (R. p. 78). When he got to the distillery, he saw a 1960 Chevrolet. He searched the car and received some evidence (R. p. 80). O'Neal was questioned about the ownership of the car. He claimed he owned the car (R. p. 82). Two POL fittings and a pair of pliers were found in the car, these later being identified as Exhibits G-1, pair of pliers; G-2, POL fitting. Too, he swept the trunk of the car out, later placing the sweepings in three containers, identified as G-4, G-5 and G-6, taking the sweepings from the trunk of the 1960 Chevrolet (R. p. 83). He had no warrant for the Defendant's arrest, and had seen them commit no crime in his presence, the Defendant having been apprehended and taken into custody by the prison trustees (dog boys). The Exhibits heretofore identified and later introduced in evidence were obtained after the Defendant was returned to the scene, and arrested. Barrett acknowledged he left the site and went to Fitzgerald, Georgia, remaining away 45 minutes-one hour (R. p. 86). He left the last time at 6:45 P. M., taking with him the Defendants (R. p. 87).

CHARLES MITCHELL HOFFMAN (R. pp. 90-99):

Hoffman identified and testified with regard to the Exhibits G-1-G-6. In addition, Exhibits G-7 and G-8 were identified and introduced, these resulting from Exhibits G-1-G-6, being photographs taken in connection therewith.

Following the testimony given by the aforesaid witnesses, Appellant's counsel made a Motion for a Directed Verdict of Acquittal (R. pp. 101-105). As the Court's failure to grant the Motion will be hereinafter argued, with the permission of the Court, we will not burden the Brief by commenting further thereon at this time.

ROBERT FOYE O'NEAL (R. pp. 108-118):

(R. pp. 108-109)—The Defendant swore that on March 13, 1967, he had been asked to work on Cooper's automobile, later taking the car to a radiator shop for specialized work. As he had nothing to do on the 14th, he had planned to go fishing with Doyle Watson, Policeman, City of Lyons, Georgia, but Watson, at the last minute, told him he could not go. Eddie Cooper, his next door neighbor, was present at the time Watson told the Defendant he could not go fishing, and stated that he knew a place he could go. Cooper stated, "If you will let me use your car, I'll carry you fishing and pick you back up and show you where to fish." Plaintiff replied "Yes." O'Neal already had his fishing tackle ready to go.

As O'Neal had Cooper's car, he let Cooper use his car. Cooper, Duncan Padgett and O'Neal left from Lyons to Abbeville, and went to a pond on a farm, the pond being located beside the road. Cooper told O'Neal he would pick him up later, around lunch time.

Cooper had used O'Neal's car the day before, March 13, while O'Neal was working on his car. Cooper had a 1961 Dodge (R. pp. 108-109).

(R. p. 110)—O'Neal had bec fishing in the pond approximately two hours when C per and Padgett came walking up from the woods. They were wet and muddy and as they came up to him, stated, "We went to a still, a whiskey still, and the Revenues have run us off and your car is still over there in the woods". They talked for a minute, then left, walking across the road. As they were standing on the opposite side of the road, someone yelled and shot at them, a man in a blue denim jacket and overalls. He shot again. Cooper and Padgett ran, and O'Neal, in turn, ran. A short time later, they were apprehended and taken into custody by prison trusties (dog boys), and carried back to the highway. There they waited until picked up, and taken to the still site, approximately 5-8 miles.

(R. p. 111)—Barrett left the still site and was gone approximately 2-3 hours after they were taken there; after their arrest; and before they left at approximately 5:30-6:30 P. M. for Americus via Fitzgerald, the last time.

O'Neal identified the army field jacket and Chevrolet as his, stating the last time he saw his jacket it was in his automobile; the next time O'Neal saw it, Agent Barrett had it at Americus, Georgia, that night (R. p. 112).

Essentially, the facts quoted form the basis for the errors noted in the following section. We can only add that no warrant was had or in existence at the time the Defendant was arrested; he had committed no crime in the presence of **anyone**; he was arrested approximately two miles distant from the still site by prison trusties (dog boys); there was nothing about his actions or conduct to arouse a suspicion of guilt; he was arrested without "probable cause"; he was not identified as being one of the men, or a man, at the still site; he made no admission, confession, or incriminating statement with regard

to the charges, the only possible exception being his claim of ownership of the army field jacket and 1960 Chevrolet automobile, the presence and use of these items being explained; his alibi was not contradicted. Further, with regard to Rule 5 (a), Federal Rules of Criminal Procedure, the evidence shows that the Defendant was illegally arrested at approximately 12:00 Noon—1:00 P. M.; taken to the still site at 1:30 P. M., held and interrogated until 5:00-6:30 P. M.; then transported to Fitzgerald, Georgia, for the purpose of storing a government automobile; and later taken to Americus, Georgia, arriving 8:00-8:30 P. M. He was fingerprinted and routinely placed in jail, his jailing being at 10:00 P. M. A portion of this information is taken from pages 22-36; 48, Record. At no time was an attempt made to take him before a committing Magistrate or U. S. Counsel. During the interval of time, 12:00 Noon—10:00 P. M., March 14, 1967, Agent Barrett, and others representing the State of Georgia, left the still site, and returned for various purposes. Agent Barrett left and was gone for 45 minutes—2 hours, depending upon whether you accept his testimony or O'Neal's (R. pp. 86-87; 111) for the purpose of getting something to eat. Ample time was had to take the Defendant before a U. S. Commissioner in compliance with Rule 5 (a), supra.

QUESTIONS PRESENTED AND SPECIFICATIONS OF ERROR.

(1) The Court erred in failing to sustain the Defendant-Appellant's Motion to Suppress, filed March 21, 1968 (R. pp. 4-9); renewed pp. 104-105, the Record.

(2) The Court erred in failing to sustain the Defendant-Appellant's Motion for Disclosure filed March 21, 1968 (R. pp. 9-11).

(3) The Court erred in failing to grant and sustain the Defendant-Appellant's Motion for Directed Verdict of Acquittal (R. pp. 101-105).

(4) The Court erred in failing to charge the jury as requested by Appellant's Counsel (R. pp. 144-145, 146) (a) with regard to the law of impeachment; (b) circumstantial evidence; (c) presence at a still; exception being noted to the Court's failure. Further, (d), in charging on the laws of Admissions, Confessions, and Incriminating Statements, in that the facts and circumstances of the case did not authorize and warrant a charge thereon, nor was the charge thereon adjusted to the facts of the case and/or a proper statement of the applicable and controlling law with regard thereto.

(5) The Court erred in failing to grant the Defendant-Appellant's Motion for Appeal Under Pauper's Affidavit (R. pp. 160-162), there being no showing or denial made that Appellant had or has necessary means and monies with which to prosecute his appeal, the refusal of the Court being without facts to support its Order; an abuse of discretion.

ARGUMENT AND CITATION OF AUTHORITIES.

Many of the arguments and observations made hereinafter will be duplicitous. For that reason, with your permission, we would like to incorporate portions of the same by reference. Too, at times we will refer to decisions merely by their names, without adding thereto "Supra". Thereby, we will not burden the Brief with unnecessary repetition.

In all argument we will refer to the parties as follows: Appellant as Defendant; Appellee as the Government.

Question One.

The evidence stipulated and introduced at the time of the hearing on the Defendant's Motion to Suppress is found on (R. pp. 15-19, 22-36, 48). Basically, it showed that the Defendant was not seen at the still; that he was arrested a distance of two-seven miles from the still by prison trustees (dog boys) without a warrant; that he was transported back to the still and there questioned by State and Federal Agents, after being informed of his Miranda rights; that information was elicited with regard to the ownership of a 1960 Chevrolet and army field jacket, these items being claimed by the Defendant. With regard to the jacket, Defendant testified he did not see the jacket until it was shown him in Americus by Agent Barrett, it last having been seen in his automobile; the automobile, when first seen, was approximately fifty-seventy-five (50-75) yards from a house. The house was some distance from the still. The car was later driven to the still; that Defendant was held under arrest, in the custody of the prison trustees and agents, from approximately 12:30 P. M. to 5:30-6:30 P. M. at the still; during the day, the agents left the still site for various reasons and purposes. Agent Barrett remained away from forty-five (45)

minutes—two (2) hours; Defendant was subsequently taken to Americus via Fitzgerald, and placed in jail in Americus at 10:00 P. M.; all of this occurring the same day; the next morning he was taken before the United States Commissioner; at no time during the day of his arrest did anyone have a warrant for his arrest.

Defendant's Motion is predicated upon Rule 41 (e), Section 41:15 and Rule 5 (a), Federal Rules of Criminial Procedure, and is supported by the facts quoted which show an illegal arrest and detention and failure to afford Defendant a preliminary examination before a Magistrate or United States Commissioner, rendering inadmissible any and all evidence derived and resulting therefrom.

Weeks v. United States, 232 U. S. 383 (1941), held that evidence obtained as a result of an illegal arrest, search or seizure, conducted by or participated in by Federal authorities, was inadmissible in any Federal Court. This Exclusionary Rule was later made applicable to State Courts, **Mapp v. Ohio, 367 U. S. 643 (1961)**, it being stated the Exclusionary Rule is an integral part of the Fourth Amendment, and the Fourth Amendment coverage was bodily incorporated in the Fourteenth Amendment Due Process Clause and thus made binding on the States. The decision in effect held that State Courts cannot admit the fruits of illegal police activities. Evidence obtained or discovered, derivative evidence, as a result of the original evidence, was also within the ambit of the Exclusionary Rule. **Silverthorne Lumber Company v. United States, 251 U. S. 385 (1920)**. The nature of this derivative rule of evidence is more clearly indicated in the case of **Wong Sun v. United States, 371 U. S. 471 (1963)**. Federal Agents made what the majority of the Court characterized as an unlawful entry into one Toy's apartment and an unlawful seizure of Toy's person. Toy made incriminating statements while he was in custody at the apartment, and on

the basis of those statements the Federal Agents discovered narcotics which were later referred to in the prosecution. The Court adopted from **Maquire, Evidence of Guilt, 221 (1959)**, the statement that the question is, "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint", **371 U. S. at 488.** Therefore, in applying this doctrine of "original sin" of evidence, Toy's statement was the product of the unlawful search and seizure of his person, the narcotics were the product of Toy's statement, and evidence about the chemical content of the discovered narcotic was in turn derivative from the seizure. Therefore, evidence at the third or fourth remove was equally inadmissible with the matter originally obtained. Applying this reasoning to the instant case, had the Government been unable to introduce in evidence the testimony and articles, with regard to the automobile and field jacket, and the sweepings, pliers and fittings taken from the car, there would have been no evidence, even circumstantial, authorizing Defendant's conviction. Actually, we contend the evidence, even if properly admitted, failed to sustain the conviction. This latter contention will be argued later. The testimony of Agents Hendley, Bailey, Barrett and Michael Hoffman, should not have been allowed under the circumstances, insofar as the same pertain to the Defendant's statements made at the still and the physical evidence discovered and introduced resulting therefrom.

McNabb v. United States, 318 U. S. 332, was the leading case on confessions obtained during an illegal detention prior to the adoption of Rule 5. Without deciding whether the confessions were voluntary, the Court held them inadmissible as evidence, for they were obtained while the Defendants were illegally detained. The logic of the decision was later incorporated in Rule 5 (a), and supports

its intent. The Court pointed out that this procedural requirement checks resort to "third degree". It avoids the implications of secret interrogation, and the suspicions that arise. The Defendants were without the aid of friends or the benefit of counsel. So was the Defendant O'Neal. The Court held that the Court should entertain a Motion to exclude such evidence. Another decision of interest is **Anderson v. United States, 318 U. S. 350, 355.** The illegal action of state officer rendered the confession inadmissible under the **McNabb Rule.** The Court held that the failure to bring the Defendant before a Magistrate as required by statute, coupled with the circumstances of unlawful arrest, protracted questioning by federal agents, and the holding of the Defendant incommunicado, required the exclusion of the confession.

The **McNabb Rule** removed the incentive for the mistreatment of Defendants. The decisions did not spell out how soon the Defendant must be brought before the Commissioner, hence it is not clear when the period of illegal detention commences, but in 1946, Professor George H. Dession expressed the opinion that the decisions of the Supreme Court, beginning with the McNabb case, suggest the interpretation that the arresting officer should take **only** such time as may be needed to bring the defendant before the nearest available Magistrate. **Dession, the New Federal Rules of Federal Procedure, I, 53 Yale L. J. 694, 713 (1946).** He could not take time for interrogation and investigation.

Generally stated, the essential prerequisite to a valid search and seizure without warranty is a valid arrest. The officers must have made a legally impeccable arrest before they can commence a charge. The "arrest" here was made by prison trustees, presumably men who no longer possessed civil rights. It was made by men who had seen the Defendant commit no crime. The actions and conduct of the Trustees and Defendant are stated

on (R. pp. 15-19). The Government agreed with the Stipulation. It said the Defendant was doing nothing at the time the Trustees came upon him; that a command was hollered, and shots fired. There was nothing about the Defendant's actions or conduct to arouse suspicion, or create "probable cause". These terms are generally applied to an arrest by a police officer without a warrant. The non-existence of even these facts (terms), made the arrest by the trustees even more violative of the Defendant's rights, and certainly more significant when determining its legality. It cannot be disputed that the arrest was illegal, therefore, we contend the evidence derived therefrom, no matter how far removed, was inadmissible. Had not the Defendant been illegally arrested, the agents could and would not have commanded his presence, nor would they have elicited from him incriminating statements, statements later used to support the introduction of other incriminating evidence. Actually, we question whether or not they were incriminating, for the statements were explained within the bounds of innocence, the evidence with regard to the jacket found at the still on a gas cylinder; the presence of the automobile. Had not the Defendant's statements been admitted, the sweepings, fittings and pliers found in the automobile could not have been admitted, or had they been admitted, would have in no way incriminated the Defendant. This reasoning is in keeping with that of **Wong Sun v. United States**, *supra*. The Court in ruling against the Motion to Suppress, in effect said that anyone can be illegally arrested and detained, and if the arresting officer subsequently states to him his Miranda Rights, he may be prosecuted with evidence thereafter obtained, no matter what the circumstances, or how far removed, with the possible exclusion of an "involuntary statement". This strikes at the very heart of the Constitutional liberties and rights of our citizens. It would negate the necessity of ever using or resorting to war-

rants. The citizens' freedom of movement and personal liberty would be destroyed.

The Motion, as stated, was further predicated upon a violation of Rule 7 (a), supported in part by **Mallory v. United States, 354 U. S. 449 (1957).** The facts are very similar. The **McNabb Rule**, already commented upon, gives further support. The purpose of the Rule is to avoid even a suspicion of wrong doing by the officers, or that they be guilty of harsh interrogation or inquisitions. Were the rule otherwise, you would simply have the word of the accused against that of the arresting officer, a "swearing contest". The Rule results in a formal charge being made against the accused, and a clear statement of his Constitutional rights.

The Government would have you believe that the agents did not take the Defendant before a Magistrate or Commissioner because they were busy investigating the site. Yet, they had time to go get food, being gone from the site from forty-five (45) minutes—two (2) hours, and various officers left and came to the still during the course of the investigation. Testimony was introduced stating that the closest United States Commissioner was in Americus, seventy-five (75) miles distant. No testimony was introduced which said there was no Magistrate in the vicinity. No acceptable and logical reason was given why the Defendant could not have been taken before a Magistrate or Commissioner by someone other than Barrett. In fact, they were held at the scene so that the agents could question them toward the end of trying to perfect the Government's case, doing so when they were bereft of friend or counsel.

The Court's failure to grant and sustain the Defendant's Motion to Suppress was in violation of the **Fourth and Fifth Amendments, Constitution of the United States of America.** Words taken from **McNabb v. United States,**

supra, read: "Compare the **Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 USC 593**, which provides when an arrest is made of persons in the act of operating an illicit distillery, the arrested person shall be taken before some judicial officer residing in the county where the arrest was made, or if none, the county nearest to the place of arrest." The purpose of this requirement is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against a misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Experience, therefore, counsels that safeguards must be provided against the dangers of over zealous law enforcement. The enforcement of criminal law cannot be left to a single functionary. Therefore, it is divided within the different parts and vested in various participants. The requirement of Rule 5 (a) constitutes a simple safe guard. It prevents practices known as the "third degree." It aims to avoid the evil implications of secret interrogation.

The constitutional provisions for the security of person and property are to be liberally construed. The courts must jealously guard the integrity of individual rights. The Fourth Amendment declaring the right of a person to be secure against search and seizure is of no value, and might as well be stricken from the Constitution, if the Government is allowed to introduce evidence derivative and/or resulting from an initial illegal arrest; search and seizure. The use of such evidence results in a denial of the constitutional rights of the accused. If the Courts do not insist upon an adherence to the Fourth Amendment, it is reduced to a "form of words."

Question Two.

The Government, in opposition to the Defendant's Motion for Disclosure, cited **Downing v. United States, 348**

F. 2d 594 (1965). Headnote 8 states that the matter rests within the discretion of the Court. Unlike the situation in **Hn. (9)**, the Defendant stated the request would be material to a proper preparation and presentation of the defense, and stated "why" (R. pp. 9-11), stating the refusal to give him a list of the Government's witnesses violated the provisions of the Fifth Amendment, United States Constitution, for the reason that he had no knowledge of the identity of witnesses the Government intended to call, and that this lack of knowledge prevented him from making a proper, informed and intelligent defense. We feel these statements differentiate the present case from **Downing.**

Too, **McNabb v. United States,** *supra,* **Hn. (2) and (4),** state that judicial supervision of the administration of criminal justice in the federal courts applies the duties of establishing and maintaining civilized standards of procedure and evidence; that in the exercise of its authority the Supreme Court has formulated applicable rules of evidence, being guided therein by consideration of justice not limited to strict canons of evidentiary evidence. We are asking such of the Court, and did ask. How can a Defendant intelligently prepare a defense when he does not know the identity of all those who possess knowledge and information about the case? The denial of this information causes one to ask, "Is the prosecution more interested in convictions than justice?" What harm, or what reason, could result and be given for denying Defendant this information? Isn't the purpose of all legal investigations the discovery of the truth? Isn't that what the Defendant would be trying to discern? Actually, in this case, the Government used a witness it did not use in January, 1968, upon the trial of Messrs. Cooper and Padgett, to-wit: Michael Hoffman (R. pp. 90-99). The request was designed to discover the identity of this witness, or any other the Government

may have used. As a result of his testimony, scientific evidence was introduced of a very complicated and involved nature. Neither the Defendant nor his counsel was capable and qualified to question him with regard thereto, or deny the scientific results thereof. As such, the Defendant was prejudiced by its use.

The Defendant asks for nothing more than he was entitled to under the laws of the State of Georgia.

Question Three.

The arguments and observations made with regard to Question One are applicable and apply here as well. Had the Motion to Suppress been sustained, the Government's case would have been even weaker. The only evidence of any nature against the Defendant under those circumstances would have been that he was illegally arrested two-seven (2-7) miles from the still. We incorporate that argument.

There are numerous decisions which support the Motion for a Directed Verdict of Acquittal. We will not try to cite them all, but here are a few.

United States v. Romano, et al., 330 F. 2d 566 (1964). The Defendant was prosecuted for the illegal possession of a still; for unauthorized production of distilled spirits; and conspiracy. They were convicted, and appealed. The Court of Appeals held that while the evidence was sufficient to sustain conviction, statutory presumptions and unexplained presence at the site of the still, as in this case, are unconstitutional as violative of due process. **Headnote 8** reads, "Statutory presumptions that defendant's unexplained presence at the still site is sufficient to authorize conviction for illegal possession of still and for unauthorized production of distilled spirits, violate the Process Clause of the Fifth Amendment, and the infer-

ences are too strange and not reasonably related to facts proved." The decision held that to apply these presumptions to persons known to have been at the still would violate the Due Process Clause of the Fifth Amendment. (No one testified that O'Neal was at the still, or saw him at the still.) Even proof of flight must carry a reasonable inference of the ultimate facts presumed, namely that the person is in possession of the still or is distilling spirits. It pointed out that one found present at a still may as well be a purchaser or a visitor for some other business purpose, therefore, the presumption is unwarranted and in violation of the Due Process Clause of the Fifth Amendment.

Sabbath v. United States, No. 898, October Term, 1967, decided June 3, 1968, U. S. Supreme Court, held that the method of entry by the Federal Agents invalidated the Petitioner's arrest, vitiating the arrest, and therefore the evidence seized in the subsequent search incident thereto. The decision is cited in **36 LW 4502.**

Court decisions setting forth the same general rules, with the same result, are **McFarlan v. United States, 273 F. 2d 417; Sykes v. United States, 373 F. 2d 607, 609; Cuthbert v. United States, 278 F. 2d 220; United States v. Freeman, 286 F. 2d 292; Fowler v. United States, 234 F. 2d 697;** and **Moore v. United States, 271 F. 2d 564.**

Vick v. United States, 216 F. 2d 228, involved a Defendant convicted of illegal possession and operation of an unregistered still and non tax paid spirits. The Court denied Defendant's Motion for Acquittal. He appealed. The Court of Appeals held that circumstantial evidence, including evidence of Defendant's flight from the still, was insufficient to sustain conviction. The facts of the instant case are not even as strong as the facts in the Vick case. The headnotes read, to-wit:

"Hn (1). The mere presence at or near an unregistered distillery, where others are working, is not sufficient to sustain the conviction for operation or possession of an unregistered still or non tax paid spirits, where the accused's presence is explained in a manner consistent with his innocence."

"Hn (3). The probative effect of flight depends upon conditions and motives which prompted it."

"Hn (4). An accused's flight is a circumstance proper to be laid before the jury, as having a tendency to prove guilt, but it scarcely comes up to the standard of evidence tending to establish it."

"Hn (5). In order to sustain conviction in circumstantial evidence cases, the inferences reasonably to be drawn from the evidence must not only be consistent with the accused's guilt, but inconsistent with every reasonable hypothesis of his innocence."

"Hn (6). On Motion for Judgment of Acquittal in a circumstantial evidence case, review of denial of such motion, tested not simply whether in opinion of the trial judge or reviewing court, the evidence failed to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude."

"Hn (7). Weight of circumstantial evidence is a question for the jury to determine, and such evidence alone, or in connection with other evidence, may justify a conviction, but great care must be exercised in drawing inferences from circumstances, and mere suspicions will not warrant a conviction."

"Hn (8). In prosecution for illegal possession or operation of unregistered still and non tax paid spirits, such circumstantial evidence, including evidence of Defendant's flight from site of still, was insufficient to sustain conviction."

"Hn (9). A conviction cannot rest upon mere conjecture and suspicion."

Vick was not seen at the still until the day of his arrest (O'Neal was never seen at the still). Then he was only sitting on the ground in the vicinity of the still. He made statements after his arrest which tended to incriminate him. (The Government claims O'Neal made such statements.) The case cites **Girgento v. United States, 81 F. 2d 741, 742,** stating presence alone is not sufficient to sustain a conviction on the court's charging him with possession of an unregistered still, in the absence of any testimony that he was in charge of, or doing work in connection with the still. **Vick** also cites **Alberty v. United States, 162 U. S. 449, 510,** to-wit:

> "While, undoubtedly, the flight of the accused is a circumstance proper to lay before the jury, having a tendency to prove his guilt, at the same time, as was observed in **Ryan v. People, 79 N. Y. 993,** 'There are so many reasons for such conduct consistent with innocence that it scarcely comes up to standard of evidence tending to establish guilt, but this, and similar evidence, has been allowed upon the theory that the Jury would give it such weight as it deserves, depending upon the surrounding circumstances.' "

As noted above, in the instant case the evidence is not even as strong as that found in **Vick.** O'Neal was never seen at the still; his "flight" began two-seven (2-7) miles from the still when fired upon by a prison trustee. Certainly, his "flight" was acceptably and reasonably explained. As stated, "flight" alone is weak evidence of guilt under the best of circumstances. The Defendant's conviction cannot rest upon mere conjecture and suspicion. The best and only evidence tying the Defendant to the still is the testimony of David Bailey (R. pp. 71-76),

stating three (3) men ran from the site. He did not identify anyone. In January, 1968, three months before the instant trial, he swore two (2) men ran from the still. So even his testimony is suspect and weak. If the convictions of Defendants in the cases cited were reversed with evidence stronger than that found here, how can the present conviction stand?

Briefly, let me cite each Count of the Indictment, and comment thereon.

Count I—There was no evidence introduced which would authorize the Defendant's conviction for possession, custody and control of a still. He was never even seen at the still, much less evidence introduced that he possessed, controlled or had custody of the stills discovered.

Count II—There was no evidence authorizing Defendant's conviction for carrying on the business of a distillery without giving bond. If his Conviction under Count I was unauthorized, certainly he should not have been convicted under Count II.

Count III—There was no evidence authorizing the Defendant's conviction for engaging in and carrying on the business of a distiller with intent to defraud the United States of taxes. Again, if he could not be convicted under Counts I and II, he could not have been convicted under Count III. The only testimony with regard to "taxes" is found on R. pp. 73 and 78. Agents Bailey and Barrett testified that there were no stamps affixed (R. p. 73); there were no tax stamps affixed (R. p. 78). This would not authorize a conviction for attempt to defraud.

Count IV—There was no evidence to authorize the Defendant's conviction for working at a distillery upon which there was no proper sign. How can he be convicted of working at a still when he was never seen at the still?

Question Four.

(a) **Impeachment**—David Bailey (R. pp. 75-76) admitted that he testified in the trial of Messrs. Cooper and Padgett that he saw but two (2) men flee the still. In the Defendant's trial, he testified he saw three (3) men flee the still. We contend this testimony authorized a Charge on Impeachment for his sworn testimony was in conflict with previous sworn testimony. A Request to Charge on Impeachment was not prepared and filed prior to the trial because Defendant knew of Bailey's previous testimony by virtue of having in his possession a Transcript of the trial of Messrs. Cooper and Padgett. Why should or could he have anticipated the agent would tell a different story? The failure to anticipate the contradiction explains why no Request was prepared. When the Court failed to charge on Impeachment, a request was made that it do so (R. pp. 144-145). The request was overruled. Exception again noted (R. p. 146). The rule of evidence with regard to Impeachment is so elementary that citation of authority is perhaps unnecessary. However, reference may be made to **McCormick on Evidence, 1964, Chapter 5, Sections 33, 34, et sequa.** Quoting from the publication, "The first, and probably the most effective and most frequently employed, is by proving that a witness on a previous occasion, has made statements inconsistent with his present testimony." P. 62; "When a witness has testified to facts material in the case, it is provable by way of impeachment that he has previously made statements relating to these same facts which are inconsistent with his present testimony. The making of these previous statements may be drawn out in cross-examination of the witness himself . . ." P. 63. The Defendant desired that the Court instruct the Jury on the effect and consequences of contradictory statements, and their consideration and application of the Rule.

(b) **Circumstantial Evidence**—Again, Defendant's counsel knowing that the case involved circumstantial evidence, and that the Government relied upon it for a conviction, considered a Charge thereon elemental to a proper statement of the case and governing law. Knowledge of the likely presentation resulted from a review of the trial transcript of Messrs. Cooper and Padgett, January, 1968. When the Court failed to charge on the Law of Circumstantial Evidence as requested by Defendant's counsel, an objection and Request was made. The objection was overruled, and exception taken (R. pp. 144-146).

The Court actually charged the law of Circumstantial Evidence (R. p. 134), but its charge was incomplete, as more important, and prejudicial, than usual due to a discourse between Defendant's counsel and the Government's counsel during Defendant's counsel's argument to the Jury, wherein the question was raised whether or not Defendant's counsel was correctly stating the law of Circumstantial Evidence to the Jury (R. p. 122). The definition given to the Jury was correct and supported by **Vick v. United States**, *supra*, **Hn. (5), (6) and (9).** This decision states that to sustain a conviction the inference reasonably to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of the accused's innocence.

Additional citations supporting the Request are **Sykes v. United States**, *supra*; **Cuthburt v. United States**, *supra* in particular **Hn. (1), (4), and (5).**

(c) **Presence at a Still**—At the conclusion of the Court's Charge, Defendant's counsel requested that the Court charge that a person's mere presence at a still creates no presumption of guilt or innocence (R. p. 145). The Request was overruled; exception taken (R. p. 146). The authority for the request is noted in the argument on

Question Three, the case of **United States v. Romano et al.**, *supra*; **Vick v. United States**, *supra*, **et al.**

The Request, exception and objections above noted were made at the conclusion of the Court's Charge, as stated. They were timely, and adjusted to the facts and law of the case.

(d) **Admissions and Confessions**—The Court charged the Law of Admissions, Confessions and Incriminating Statements (R. pp. 134-135). We do not believe and feel that this Charge was adjusted to the facts, or proper. It was so basically in error that although we did not specifically object thereto at the conclusion of the Court's Charge, it requires consideration.

Black Law Dictionary, Fourth Edition, defines Admission, **page 68,** as: "The avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt. A statement by defendant of fact or facts pertinent to issues tending, in connection with proof of other facts or circumstances, to prove guilt, but which is, of itself, insufficient to authorize conviction"; on **page 369, Black** defines Confession as, "A voluntary statement made by a person charged with the commission of a crime or misdemeanor, communited to another person . . . wherein he acknowledges himself to be guilty of the offense charged, . . .".

The Defendant's statement about the field jacket and automobile are relied upon to support the Charge. Not only did he deny making the statement (R. p. 112) Agent Hindley testified he made about the jacket (R. p. 66), the statements, if made, were not admissions, confessions or incriminating, but exculpatory statements, ones clearing or tending to clear from alleged fault or guilt; excusing." **Black Law Dictionary, p. 675.** Therefore, a Charge on Admissions, Confessions and Incriminating Statements was not adjusted to the facts of the case, and proper.

For the sake of argument, at best the statements were nothing more than an admission and/or incriminating statement. Certainly, they did not constitute a confession. This being true, no Charge should have been made on confessions, aside from admissions and incriminating statements. Even then, the Jury should have been instructed on the definitions of admissions and incriminating statements, in keeping with the definitions taken from **Black**. The failure to instruct, and define, prejudiced the Defendant's case.

When giving consideration to the exceptions noted, the Court should take note that the Charge began at 2:15 P. M., following a recess, 12:40 P. M.-2:00 P. M. (R. p. 131). It was concluded at 3:10 P. M., Charge and exceptions, taking fifty-five (55) minutes. This left little time for the preparation and filing of written Requests.

Question Five.

Defendant filed a Motion for Appeal under Paupers Affidavit, and it was denied (R. pp. 160-162). The facts and circumstances set forth in the Motion stated the Defendant was without adequate means and monies to finance the prosecution of his Appeal, having and owning no property, real or personal, with which to finance the same; that his Appeal was filed in good faith. There was attached a sworn Affidavit. The Court, without any response being filed by the Government, and without a hearing, denied the Motion. The action was without authority and/or factual support. As a result, the cost of this Appeal has been borne by Defendant's counsel under an agreement that he would, in time, to the limit of his ability, reimburse him therefor. We ask that the Court rectify this situation by directing that Defendant's counsel be reimbursed for the expenses of this Appeal within the applicable limits of law.

CONCLUSION.

Appellant respectfully submits that errors noted and argued are correct statements of law, and request that the Sentence and Judgment be reversed with directions to enter a Judgment of Acquittal; in the alternative, Defendant be granted a new trial.

Respectfully submitted,

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State of Georgia,
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Certificate.

This is to certify that I have this date served upon counsel for the United States of America, Mr. Floyd M. Buford, United States Attorney, U. S. Post Office Building, Macon, Georgia, and Mr. Walker P. Johnson, Assistant U. S. Attorney, U. S. Post Office Building, Macon, Georgia, a true and exact copy of the above and foregoing Brief, by United States Mail.

This ... day of September, 1968.

.....

T. Malone Sharpe,
P. O. Box 349,
Lyons, Georgia 30436.

SUPREME COURT, U. S.
No. 197
OFFICE-SUPREME COURT, U.S.
FILED
1969
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT FOYE O'NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Archer v. *United States*, 393 F. 2d 124	8
Holland v. *United States*, 348 U.S. 121	9
Mallory v. *United States*, 354 U.S. 449	8
Preston v. *United States*, 376 U.S. 364	7
Robinson v. *State*, 93 Ga. 77, 18 S.E. 1018	7
Thompson v. *United States*, 389 F. 2d 37, certiorari denied, 391 U.S. 903	9
United States v. *Chase*, 372 F. 2d 453, certiorari denied, 387 U.S. 907	8
Warden v. *Hayden*, 387 U.S. 294	7

Statutes and rule involved:

26 U.S.C. 5180	2
26 U.S.C. 5601(a)	2
26 U.S.C. 5602	2
26 U.S.C. 5609(a)	8
Ga. Code Ann.:	
Section 27-206	7
Section 58-1076	6
Rule 16, F. R. Crim. P.	8

Miscellaneous:

Voorhees, *The Law of Arrest* (2d ed. 1915)	7

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1969. A petition for rehearing was denied on May 6, 1969. The petition for a writ of certiorari was filed on June 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was unlawfully arrested and unreasonably detained prior to his appearance before a United States commissioner.

2. Whether petitioner was entitled before trial to a list of all of the government's witnesses.

3. Whether the trial court erred in failing to give petitioner's requested instruction on impeachment.

4. Whether instructions proposed by petitioner on circumstantial evidence and mere presence at the site of a still, and a claim of misuse of the term "confession" in the closing charge, were properly rejected.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of possessing an unregistered distillery, carrying on the business of a distiller without giving bond and with intent to defraud the United States, in violation of 26 U.S.C. 5601(a) and 5602 (Counts 1-3), and working in a distillery upon which no sign had been posted as required by 26 U.S.C. 5180 (Count 4). On April 4, 1968, he was sentenced to imprisonment for concurrent terms of thirty months on Counts 1-3 and twelve months on Count 4. The court of appeals affirmed.

1. The evidence adduced at a hearing on a motion to suppress and at trial showed that Georgia Alcohol Agents Bailey and Hendley arranged to meet with federal Alcohol and Tobacco Tax Agent Barrett in a heavily wooded area of Wilcox County, Georgia, at

10 a.m. on March 14, 1967, to investigate information that a still was somewhere in that vicinity. The State agents arrived before Barrett, and commenced to drive along some of the back roads. They observed tire tracks on one road, and followed them to a location where a 1960 Chevrolet was parked in a thicket (R. 59, 72).[1] The agents left their car and began to search the area. About 75 yards from the Chevrolet they came upon a vacant house and barn (R. 59). While searching these structures, agent Hendley observed a man, later identified as co-defendant Duncan Padgett (R. 61), walking nearby. When the agent called upon him to stop, Padgett responded by fleeing and crying out "Revenue Officers" as he ran (R. 59, 72). The agents gave chase. Padgett led them to a clearing containing four illicit 1500-gallon stills, one of which was in operation (R. 59, 72). As one of the agents reached the clearing, he saw two or three unidentified men running away. The agents lost sight of the men.

Agent Hendley radioed a nearby prison farm for help. Within a few minutes a prison warden, armed trusties, and bloodhound dogs arrived and began to track the men. The agents drove along the dirt roads in the wooded area in order to prevent the men from reaching the main roads. At about noon, the trusties and the dogs came upon Padgett, petitioner and co-defendant Eddie Cooper approximately two miles from the still site. They surrendered only after a chase during which several warning shots were fired

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[1] "R." refers to Volume I of the two-volume record filed with the Clerk of this Court.

(R. 73). During the course of the pursuit, federal agent Barrett had arrived in the area, and was in radio contact with the prison personnel and the State agents, who remained near the stills (R. 74).

2. Following their apprehension the three suspects were taken to the federal agent and then returned to the site of the stills. Both Hendley and Barrett advised them of their right to silence and counsel. They indicated that they understood their rights (R. 79-80). Thereupon, handcuffs which had been previously placed upon them were removed, and they were allowed to move about while the agents investigated the distilleries. Among the items at the site of the distilleries were a plaid shirt hanging in a tree and two jackets lying upon some metal gas cylinders. While the investigation was continuing, Padgett asked one of the officers whether he could get his shirt, pointing to the plaid shirt in the tree. He received permission to do so. After putting it on, Padgett asked Cooper and petitioner whether they wanted their jackets. Petitioner said he did, and told Padgett to get his pack of cigarettes out of a pocket. Padgett found no cigarettes in the pocket of petitioner's jacket and so advised petitioner, who then directed him to put the jacket down. Padgett did as petitioner requested (R. 63-66).

3. Agent Barrett thereafter asked whether any of the suspects owned the Chevrolet parked in the thicket. No one answered. A search of the car produced pipe fittings, a pair of pliers, and fragments of wheat bran and wheat starch, all items useful in a still operation (R. 83, 90-95). Later, petitioner

told Barrett that the car was his, and that he had owned it for about a year (R. 82). The investigation, inventory, and destruction of the stills took several hours. Then, agent Barrett drove petitioner and his co-defendants first to Fitzgerald, Georgia, to arrange for the storage of Barrett's car; thereafter they drove, in the seized vehicle, approximately 70 miles to Americus, Georgia, the closest place where a United States Commissioner resided (R. 25-28). They arrived in Americus after dark, and proceeded directly to the city jail. The suspects were lodged there for the evening and appeared before the Commissioner on the following morning (R. 30).

4. Petitioner took the stand in his own behalf. He denied telling Barrett that he had owned the car for a year, declaring that he had bought it the day before (R. 114, 115). Petitioner stated that, on the morning of March 14, he had allowed his neighbors, Cooper and Padgett, to use the car on condition that they drive him to a pond where he intended to fish. After several hours Padgett and Cooper [2] emerged from the woods, near where petitioner was fishing, and declared that they had gone to a still but that agents had run them off, leaving petitioner's car behind. Petitioner told them that there was no use standing around and they might as well leave the area. As they walked across a road, they heard shots and saw armed prison trusties coming after them. Padgett and Cooper began to run, and petitioner, frightened, joined them. They later surrendered after more shots

[2] Both Padgett and Cooper had been tried prior to petitioner (Pet. 7).

were fired (R. 108-110). Petitioner declared that his jacket had been left behind in the car when he was dropped off, and that he had no knowledge of the use of the car for violations of the liquor laws (R. 112). Petitioner's explanation had never been disclosed to any of the agents prior to trial (R. 115, 118).

ARGUMENT

1. At the pre-trial hearing on his motion to suppress, petitioner challenged the validity of his arrest and the promptness of the preliminary hearing. Both allegations were, in our view, properly rejected by the lower courts.

a. The validity of petitioner's initial apprehension by prison trusties enlisted to assist the State agents cannot be measured by the application of standards regarding citizen arrests of persons unknown to them for offenses not committed in their presence. Prior to petitioner's apprehension the State agents had personally observed an unlawfully operating distillery, a felony under State law. Ga. Code Ann. 58-1076. They had probable cause to believe that the felony was being committed by the men whom they saw fleeing from the vicinity of the stills into a heavily wooded and sparsely populated area. With the agents in hot pursuit of the individuals, there was clearly no time to obtain a warrant. Needing assistance to apprehend the suspects, the agents called upon the prison trusties and bloodhounds. The role performed by the trusties was nothing more than a contemporary application of the time-honored, common-

law procedure whereby police officers summon private citizens to aid in the apprehension of fleeing suspected felons. Voorhees, *The Law of Arrest* 99-101 (2d ed. 1915); see *Robinson* v. *State*, 93 Ga. 77, 18 S.E. 1018; Ga. Code Ann. 27-206.

In any event, no incriminating information was secured from petitioner before agent Barrett assumed custody a few minutes after the initial apprehension. Barrett, who had seen the operating distillery prior to proceeding to the spot where petitioner was being detained, and was familiar with the circumstances surrounding petitioner's apprehension, certainly had probable cause to make an arrest. The contemporaneous search of the Chevrolet was reasonable, *Preston* v. *United States*, 376 U.S. 364, and the items obtained as a result of that search were properly admitted in evidence, *Warden* v. *Hayden*, 387 U.S. 294.

b. Following his arrest petitioner was twice advised of his right to counsel and silence. He was returned to the site of the distillery and stood by while the State and federal agents engaged in the task of investigating the area, inventorying the equipment, and destroying the stills. During this time he made two incriminating statements: one to a co-defendant admitting ownership of a jacket found at the still site, the other to agent Barrett indicating that he was the owner of the Chevrolet parked nearby. The comment made to a co-defendant does not fall within any constitutional or procedural proscriptions against evidence obtained by the government agents. The statement regarding ownership of the Chevrolet came during the course of the agents' investigation of the

stills, and was not made inadmissible because of the failure up to that time to take petitioner to a United States Commissioner. At that point, only a limited amount of time had elapsed, and there was accordingly no unreasonable delay. The nearest commissioner was 70 miles away and the stills required the immediate attention of the officers. (26 U.S.C. 5609a). Petitioner's statement was not the product of a period of delay used to question an unwarranted defendant as in *Mallory* v. *United States*, 354 U.S. 449, as the court below properly concluded (see Pet. App. 9-10). It was, therefore, properly admitted in evidence.

2. On the eve of trial petitioner moved to have the government disclose all of its witnesses. The district court, we submit, properly denied the motion. The government's witnesses consisted of State agents Hendley and Bailey, federal agent Barrett, and a chemist who identified substances taken from the seized Chevrolet as wheat bran and wheat starch. The identities of all these witnesses except the chemist were known to petitioner before trial since they had testified previously at the trial of Padgett and Cooper (Pet. 7). Petitioner has failed to establish prejudice from the mere failure to be made aware of the chemist's identity. Manifestly, he could reasonably have anticipated the crux of the chemist's expert testimony. *Archer* v. *United States*, 393 F. 2d 124 (C.A. 5); *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4), certiorari denied, 387 U.S. 907; Rule 16, F.R. Crim. P.

3. At trial, agent Bailey testified that when he reached the site of the stills in pursuit of Padgett, he saw three men running away (R. 72). On cross-

examination defense counsel elicited the fact that at the trial of Padgett and Cooper two months before, Bailey stated that he had seen two men fleeing from the still site. Bailey acknowledged the prior testimony (R. 75-76). In his closing charge the trial judge did not refer specifically to this inconsistency, nor did he grant a request by defense counsel after the charge for further instructions on impeachment. However, the judge had given a lengthy charge on credibility, in which he instructed the jury that it was the sole judge of credibility and in that connection should consider, *inter alia*, the extent to which a witness was supported or contradicted by other evidence. The jurors had the inconsistent statement recalled to them by defense counsel in his closing argument and therefore were fully aware that Bailey's credibility was in issue and that his credibility was for them to decide. Accordingly, this issue was adequately handled, and provides no ground for reversal. *Thompson* v. *United States*, 389 F. 2d 37 (C.A. 9), certiorari denied, 391 U.S. 903.

4. Petitioner asserts several other claims relating to the trial court's charge. He complains that the court declined to instruct that, in order to convict on circumstantial evidence, every hypothesis except that of guilt must be removed by the evidence. Such a charge was rightly refused. The court instructed fully on the standard of reasonable doubt and the probative value of circumstantial evidence. In such a circumstance, the instruction requested by petitioner would have been "confusing and incorrect." *Holland* v. *United States*, 348 U.S. 121, 139-140. An instruc-

tion that no inference was to be drawn from "mere presence" at the site of a still was properly rejected as contrary to the evidence adduced by the government.

Finally, the attack upon the court's use of the word "confession" in the closing charge is frivolous. In discussing petitioner's statements admitting ownership of the jacket found at the distillery and the Chevrolet automobile located nearby, the court said, "I'm not telling you, if he did say it, that it was an admission or confession." The court instructed further that evidence regarding admissions and confessions should be viewed cautiously and weighed with care; but if the jury was satisfied that the statements were made, it should consider them as evidence against the person who made them (R. 135). There clearly was no error in these instructions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ROBERT FOYE O'NEAL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER.

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INDEX.

	Page
Statement of the case	2
Reasons for granting the writ	3
Conclusion	5

Cases Cited.

Harris v. State, Case No. 44,371, decided May 15, 1969, Court of Appeals of Georgia, yet to be reported 5

Leon Carr v. The State, Case No. 44,145, Court of Appeals of Georgia, decided March 3, 1969, yet unreported 4

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SUPPLEMENTAL BRIEF OF PETITIONER.

We respectfully submit for filing this Supplemental Brief, feeling that the observations, comments and citations herein made are pertinent and material to a proper consideration and determination of the cause.

STATEMENT OF THE CASE.

In Respondent's Statement, p. 4, paragraph 1, it states that a prison warden, armed trusties and bloodhound dogs arrived at the scene within a few minutes. The evidence discloses that they arrived 30-45 minutes after being called (R. p. 60). Further in said paragraph, it states Petitioner surrendered only after a chase during which several warning shots were fired. To the contrary, the evidence shows Petitioner was standing beside a "public road" and fled only after shots were fired (R. p. 110). Shots were fired even before and/or simultaneously with a demand for surrender was made.

On p. 5, numerical paragraph 4, of Respondent's Brief, the circumstances of Cooper's possession and use of Petitioner's automobile are misquoted. Correctly, Cooper overheard a conversation between Petitioner and policeman Watson. Noting that Watson could not go fishing, and that Petitioner already had his fishing tackle, Cooper said, "I have some place to go; if you will let me use your car I will carry you fishing and pick you back up and show you where to fish". Petitioner said "yes". Cooper's use of the car was not conditioned upon Petitioner's being allowed to go fishing. Petitioner simply gratuitously allowed him to use the car. When noting the evidence about the car, it should be remembered that Petitioner's car was a distance of at least one-fourth—one-half mile from the still (R. p. 113).

The circumstances surrounding Padgett's and Cooper's emergence from the woods, and telling Petitioner of their flight from the still, are set forth on p. 110, the Record. Petitioner stated, "We stood there and talked a while, a few minutes. I didn't know where I was at and I couldn't get the relation to where my car was. I said "well, there is no use of standing here, let's go". We walked across

the road and we were standing by the road when all at once someone began to shoot at us and yelled. It was kind of behind me, and when I looked back there was a man with overalls on, a blue denim jacket and overalls; and he shot again. I looked, looked back around and Mr. Cooper and Mr. Padgett were running, and I, in turn, run".

On p. 6, Respondent's Brief, it states that "Petitioner's explanation had never been disclosed to any of the agents prior to trial". The observation is apparently made for whatever prejudicial effect it may have. In response, we ask that the Court note neither had the Government's case been made known to Petitioner. In fact, it refused to even name its witnesses.

REASONS FOR GRANTING THE WRIT.

I wish to comment on the Argument portion of Respondent's Brief, beginning on p. 6.

Paragraph 1 (a) states "They had probable cause to believe . . ." It should be noted that the number and identity of those fleeing the still were unknown. There is no evidence that the still was in a "sparsely populated area". Petitioner, in his Statement, mentioned the presence of a man fishing in the pond at which he was fishing at the time Padgett and Cooper came upon him after fleeing the still. This gentleman's house was approximately 100 feet from the pond. The attempt to equate prison Trusties with citizens, so as to place them within the right and authority of citizens to aid in the apprehension of fleeing suspects, is somewhat and in part weakened by the fact they were not even citizens. They did not even have this authority.

On p. 7, Respondent states no incriminating information was secured before Agent Barrett assumed custody. We

answer, "None would have been obtained had not an illegal arrest been made". Barrett did not make the initial arrest, the prison trusties did. The clothing and "items" found in the automobile, and their association with Defendant, would not have been known but for the statements made by the Defendant and Co-Defendants after their illegal arrest and detention, for whatever incriminating effect and significance they had.

On p. 8, Respondent states "Manifestly, he would have reasonably have anticipated the crux of the chemist's expert testimony". How? Defendant didn't even know of his existence nor had his testimony on the "items" been introduced in evidence at the previous trial of Padgett and Cooper (R. pp. 87, 88).

On p. 9, it is stated the instruction requested by Petitioner on the weight to be given circumstantial evidence would have been confusing and incorrect. This is preposterous. The requested instruction followed the citations of authority previously given in Petitioner's Motion for Rehearing and Petition for a Writ of Certiorari. A recent decision of the **Court of Appeals of Georgia, Leon Carr v. The State, Case No. 44,145**, decided March 3, 1969, yet unreported, restates the rule, "When a conviction rests on circumstantial evidence alone, and this evidence supports more than one theory—one consistent with the guilt of the accused and another with innocence—it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt". On **p. 10** of the Opinion it reads, "To sustain a conviction on circumstantial evidence only, the State must prove facts that are not only consistent with the hypothesis of guilt of the accused, but the facts proved must exclude every other reasonable hypothesis". This argument and authority are applicable to Question 4 (b) of Petitioner's Petition for a Writ of Certiorari.

Beginning on p. 9, Respondent speaks of the Petitioner's request that an instruction be given on "mere presence at a still". The recent case of **Harris v. State, Case No. 44,371,** decided May 15, 1969, **Court of Appeals of Georgia,** yet to be reported, states that evidence of the defendant's presence at a still; that he raised a tin cover; stuck his hand inside and tasted the contents; is not sufficient to sustain a conviction of making liquor, these acts being consistent with idle curiosity. The decision cites **16 Ga. App. 291,** and supports their request. The citation is applicable to Questions 1, 3 and 4 (c) of Petitioner's Petition for a Writ of Certiorari.

CONCLUSION.

Petitioner and Counsel respectfully ask the Court's consideration of his Appeal, feeling it merits your attention. The legal principles seem so clear, perhaps Petitioner and his Counsel have overlooked additional and more authoritative argument, but humbly we ask your indulgence.

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Certificate of Service.

I hereby certify that I have served upon Erwin N. Griswald, Solicitor General, United States of America, five (5) copies of the within and foregoing Supplemental Brief,

by depositing the same in a properly addressed envelope with correct amount of postage affixed thereon in the United States Mail.

This 14th day of July, 1969.

.....

T. Malone Sharpe.